PHILLIPS PETROLEUM CO.

IBLA 79-30 Decided March 2, 1979

Appeal from decision GS-113-O&G of the Acting Director, Geological Survey, affirming denial of a request for refund for certain excess royalty payments. Lease OCS-P 0166.

Affirmed.

1. Oil and Gas Leases: Royalties--Outer Continental Shelf Lands Act: Royalties: Excess Payments

   A request for refund of excess payments under 43 U.S.C. § 1339 (1970) must be made as the limitation in the statute provides, within 2 years from the date such payments are actually made.

APPEARANCES: Thomas L. Barton, Thomas M. Blume, Dale A. Mayer, Darryl A. Harvey, Esqs., Phillips Petroleum Co., for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Phillips Petroleum Co., appeals from the September 25, 1978, decision of the Acting Director, United States Geological Survey (Survey), GS-113-O&G, which affirmed the determination of an oil and gas supervisor that Phillips (appellant) was barred from recovering certain costs from the United States because claim had not been made for such reimbursable costs within a 2-year statutory period established by 43 U.S.C. § 1339 (1970) (Outer Continental Shelf Lands Act), which states in part: When it appears to the satisfaction of the Secretary that any person has made a payment to the United States * * * in excess of the amount he was lawfully required to pay, such excess shall be repaid * * *, if a request for a repayment of such excess is filed with the Secretary within two years after the making of the payments * * *.

Appellant, along with Cities Service Oil Company and Continental Oil Company, is a lessee of Federal oil and gas lease OCS-P 0166. From initial production in June 1968 to December 31, 1972, royalty was taken in value rather than in kind. No allowance was made for the cost of transporting royalty substances from the offshore platforms to the onshore point of delivery where the value of production was determined for royalty purposes.

On October 11, 1974, Survey issued a decision which established the right of Sun Oil Company, et al., (Federal lease OCS-P 0240), to be reimbursed for the transportation costs of royalty in value.

By letter of November 25, 1974, Survey advised appellant of this decision and stated: "We expect that this decision will be applicable to Phillips['] operation on lease OCS-P 0166." The letter further stated:

> To implement the directions from the Geological Survey in Washington, D.C., it will be necessary for Phillips to submit additional information to determine the actual yearly transportation allowances for the years 1968 through 1972. The necessary information needed is the yearly operating costs. The yearly investment costs indicated on Exhibit I (revised) of Phillips letter dated 4-18-74, should provide sufficient investment information in addition to the above. The 1974 actual transportation allowances should be submitted, at your convenience, shortly after the end of the year. As in the past, information submitted will be subject to substantiation and/or an audit.
>
> To expedite these calculations, this office has prepared four schedules that may be used to calculate transportation allowances. They are listed below and are enclosed, with directions, for your benefit and use.
>
> | Schedule | Title |
> |---|---|
> | I | Actual (year) Transportation Allowance |
> | II | Investment by Year |
> | III | Operating Expenses (by year) |
> | IV | Depreciation and Return on Depreciated Investment |
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> Upon receipt of the yearly operating costs, this office will calculate the actual transportation allowance for the years 1968 through 1972. Should Phillips prefer to make the calculations, either the enclosed schedules or your own format may be used.

> The recomputation of royalties due the United States, due to the expected allowance of transportation costs to the Phillips Petroleum Company, will of necessity follow agreement on the yearly transportation allowances.

By letter dated July 21, 1975, Survey approved transportation allowances and rates submitted by appellant for the years 1968-1972.

By letter dated December 16, 1975, appellant was advised that the October 11, 1974, decision applied to oil produced from lease OCS-P 0166. The letter further advised appellant to take prompt action in requesting refunds under section 10 of the Outer Continental Shelf Lands Act.

By letter dated December 31, 1975, Phillips filed a formal request for refunds totalling $79,341.54 for the years 1968-1972.

On December 20, 1976, the oil and gas supervisor denied appellant's request stating:

> We regret to inform you that our determination with respect to Decision GS-60-O&G as it applies to lease OCS-P 0166 has been overruled by the Solicitor, Department of the Interior. Our determination considered the October 11, 1974 decision date as commencing the two-year statutory period for the filing of your refund request under Section 10 of the Outer Continental Shelf Lands Act., 43 U.S.C. § 1339. The Solicitor is of the opinion that the two-year period runs from the dates of making the payments involved. The latest payment would have covered the month ending December 31, 1972 and its statutory period would have terminated December 31, 1974.

Appellant challenged this determination and the decision appealed from followed. That decision states in relevant part:

> The amount required by the Supervisor was incorrect, and the payments made by the lessor were therefore in excess at the time they were made. Section 10 of the Outer Continental Shelf Lands Act allows no exception to the express statement that a request for refund of an excess payment must be made within 2 years of the payment. In our opinion, Congress simply intended that lessees examine amounts that the Supervisor requires to be paid. If the Supervisor makes an error, a lessee has 2 years after the payment within which to identify the error and apply for a refund.
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> If a lessee identifies an apparent error before making a payment, he has the option of requesting a refund within 2 years of making the payment or of making the payment under

> protest. Making a payment under protest would toll the 2-year statute of limitations until Geological Survey made a decision on the validity of the lessee's claim. The lessee would still have to apply for a refund within 2 years after Geological Survey's decision, assuming the decision was favorable to the lessee.

The Assistant Solicitor's opinion, upon which the above decision was based, discussed requests for refunds made by Sun Oil Company, Continental Oil Company, and Union Oil Company in addition to Phillips' claims. Sun Oil Company alone had made its payments under protest in 1970 and filed for a refund on January 12, 1976. The Assistant Solicitor allowed Sun Oil's claim quoting from the Comptroller General's Opinion B-156603, November 5, 1965, which discussed claims for refunds by oil companies where payments had been made under protest and more than 2 years prior to the submission of the claims:

> While it thus might be suggested that the claim is barred by the statutory two year limitation we would not be inclined to question the refund, since the initial payments to which it relates were paid over a number of years under protest and the claim was, in fact, filed within two years of the departmental determination under which it became allowable . . .." (Emphasis added.)

Thus, the Assistant Solicitor held that Sun Oil, because it had protested the payments at the time they were made, had 2 years from October 11, 1974, within which to file its request for a refund. Since Sun Oil did so, it was entitled to a refund. As to the other oil companies, the Assistant Solicitor stated:

> Unlike Sun Oil Company, none of these oil companies, protested and appealed within two years from the date of their payment of the excess royalty. Such an action would have tolled the running of the statute of limitations. Nor did any of these oil companies file a request for repayment with the Secretary within two years after the making of the excess payments.
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> The administrative determination that made these payments excessive was clearly an appealable administrative determination; it was that a reasonable cost of transporting royalty substances from the well to the onshore point of delivery is not an allowable deduction in the computation of the amount of royalty due the United States. Nevertheless only after the decision of the Director of Geological Survey in the Sun Oil case did the other oil companies request a refund.

> The two year statute of limitations set forth in 43 U.S.C. § 1339 is both straightforward and unequivocal, for a repayment to be made "a request for repayment of such excess [must be] filed with the Secretary within two years after the making of the payment . . .." It bars the claims for excess royalty payments made by Continental Oil Co., Phillips Petroleum Co., and Union Oil Co. from 1968 to 1972. [Footnote omitted.]

On appeal to this Board, appellant argues that the statute of limitations should run from October 11, 1974, the date of Survey's decision establishing Sun Oil Company's right to a refund, because it was not "lawfully required" to pay the amounts prior to that time. Appellant contends that its entitlement to a refund should not now be barred on the theory that it should have been on notice, prior to the October 11 decision that it was making, or had made excess payments. Appellant further argues that 43 U.S.C. § 1339 contains no directive to lessees to pay under protest when they suspect that excessive payments are being required. It also argues that the situation presented is comparable to that of an undiscovered tort, in which the statute of limitations would commence to run upon discovery of the tort, or, when in the exercise of reasonable diligence, it should have been discovered.

[1] We hold that the statute of limitations, 43 U.S.C. § 1339, was correctly applied below to bar appellant's claim. As the Assistant Solicitor stated, the statute is "straightforward and unequivocal" in its requirement that a claim for a refund of excess payments must be made within 2 years after such payments were made.

It is a general rule of statutory construction that a statute of limitations begins to run from the time the cause of action which it covers accrues; where such cause of action depends upon the happening of a further event, the statute is tolled upon the happening of such event. Comp. Gen. Op. B-7631 (May 7, 1941). The statute under consideration sets out n subsequent event to trigger it and it is not tolled, therefore, by the October 11, 1974, decision by Survey.

The decision of October 11, 1974, in no wise constituted "the making of the payments" envisaged by sec. 10 of the OCS Act, 43 U.S.C. § 1339 (1976). We regard appellant's attempted analogy of the case to an "undiscovered tort" to be misplaced. There is not a scintilla of evidence to demonstrate that Congress intended the 2-year statute of limitations embodied in section 10 to begin to run from the time of determination of entitlement rather than in accord with the plain words from the time of "the making of the payments."

It avails appellant nothing to point out that the statute does not contain an instruction to pay under protest. We are constrained to look at the specific language the statute does contain; that language creates a right to a refund where such right is asserted within 2 years of the time the payments were made. As Justice Frankfurter stated in Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946): "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter." We also agree that there was a legislative purpose to be achieved to require lessees to promptly verify their accounts and ascertain the correctness of payments made within the time provided.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Frederick Fishman
Administrative Judge

We concur:

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Joseph W. Goss
Administrative Judge

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Joan B. Thompson
Administrative Judge